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No. 835

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ROBERT KENNETH DEWEY, *Petitioner*

v.

REYNOLDS METALS COMPANY, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MEMORANDUM FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

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THE INTEREST OF THE AMICUS CURIAE

This memorandum is filed with the consent of the parties by the National Jewish Commission on Law and Public Affairs, which is a voluntary association of attorneys and social scientists organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community in matters of public concern. The *amicus'* concern with this case—in which it filed briefs in the Court of Appeals—arises out of the importance of the legal

issues to Sabbath-observers throughout the country, and particularly to Orthodox Jews who are enjoined by Biblical command to "observe the Sabbath day to keep it holy" and "not [to] do any manner of work" on that day (*Deuteronomy*, V, 12, 14). In our view, Congress' prohibition against discrimination on account of "religion" in Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), was designed to secure the rights of individual employees to the free exercise of religious practices such as Sabbath-observance wherever such practices would not impose a demonstrable undue hardship on an employer. The majority of the court below has construed the Act to deprive the religiously observant of that right, notwithstanding the definitive interpretation given the Act by the federal agency charged with its administration and implementation. In our view, the holding below presents a grave danger to religious liberty in this country and warrants plenary consideration by this Court.

ARGUMENT

1. Because of the sincere religious beliefs, petitioner does not work on Sundays *and* will not ask another worker to substitute for him on that day. Solely as a result of his unavailability for Sunday overtime work and his refusal personally to request a fellow employee to take his place, he was discharged in September 1966 from employment at respondent's plant, where he had held a succession of jobs since June 1951. The principal issue in this Court is whether the discharge amounted to discrimination in employment because of petitioner's "religion," as that term is used in Section 703(a)(1) of the Civil Rights Act of 1964. A secondary issue—also important to the administra-

tion of Title VII of the 1964 Act—is whether petitioner's unsuccessful effort to obtain relief under the grievance procedure of a labor contract bars him from instituting a civil action in a federal district court pursuant to Section 706 of the Civil Rights Act. Both issues deserve plenary consideration by this Court, being of great importance to the adherents of Sabbath-observing faiths in this country as well as to all employees whom the Congress sought to protect by Title VII of the 1964 Act.

2. The factual context in which the case arises is spelled out in a stipulation appearing at pages 1a-8a of the petition. That stipulation establishes the following relevant facts:

(a) There is no dispute as to the sincerity of the religious convictions which prevent petitioner from working on Sundays or asking another employee to substitute for him. He notified respondent of his unavailability for Sunday work before the overtime assignments which led to his discharge (Pet. 6a, ¶¶ 24, 25).

(b) The labor contract between respondent and the union representing its employees provided for "compulsory overtime" upon assignment by respondent "except when an employee has a substantial and justifiable reason for not working." In September 1965, in response to a union objection—which apparently had nothing to do with observance of religious holy days—respondent issued a policy statement authorizing any employee who was assigned to an overtime shift to arrange for substitution by another qualified employee (Pet. 2a-3a, ¶¶ 7-9).

(c) When initially assigned to Sunday overtime shifts, petitioner made use of this generally available

substitution policy, but thereafter concluded that a request by him to a fellow employee that the latter work on Sunday would violate his religious beliefs (Pet. 4a-5a, ¶¶ 15-17).

(d) Petitioner volunteered for overtime work on days other than Sunday (Pet. 4a, ¶ 13).

(e) On none of the three Sundays when petitioner refused to work and refused to obtain a substitute was the overtime load so heavy as to require all eleven employees in his job classification to report for work. The number called on each of the days was seven, four and five, respectively (Pet. 4a-5a, ¶¶ 16, 17, 19).

(f) Respondent refused to request or direct the other employees in petitioner's job classification to substitute for him on any of the three Sundays on the ground that, in respondent's view, "this would result in a waiver of the compulsory overtime provisions of the Labor Agreement" (Pet. 6a, 23). There are no other facts in the record to show any hardship to respondent in the actual operations of the plant if it had undertaken the task of seeking and obtaining, from among available employees, a replacement for petitioner's Sunday overtime assignments.[1]

(g) Petitioner was discharged on September 12, 1966. Four days thereafter—on September 16, 1966—

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[1] In addition to the three, six and five die repairmen apparently available on each of the three Sundays, there were also two other employees in different job classifications who were qualified as die repairmen and who could have substituted for petitioner on those days. (In fact, one of them had worked as petitioner's replacement, at his request, in the past.) Even assuming that respondent could not, under the labor contract, assign either of the two employees to this overtime shift against their will, there is no explanation in the record for respondent's refusal even to seek their voluntary cooperation.

he filed a civil rights complaint with the Michigan Civil Rights Commission. A week after his discharge—on September 19, 1966—his labor-contract grievance was received by respondent's personnel department (Pet. 5a, 7a, ¶¶ 20, 29).

(h) Less than a month after the State Commission rejected his complaint, petitioner filed a charge with the Equal Employment Opportunity Commission. While that complaint was pending in the Commission, his labor-contract grievance was submitted to arbitration and denied (Pet. 7a, ¶¶ 27, 30, 31).

3. These facts establish that respondent violated the applicable Equal Employment Opportunity Commission regulation, 29 C.F.R. § 1605.1, which interprets the Civil Rights Act's prohibition against employment discrimination on account of religion as requiring an employer "to make reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer's business." In fact, respondent made no accommodation whatever to petitioner's strict observance of Sunday as a day of rest. In allowing petitioner to obtain a substitute for Sunday overtime assignments, respondent was according to petitioner only the same privilege it had granted, at the union's request, to all employees who wished to transfer out of overtime assignments for any reason whatever (or, indeed, for no reason at all). And by refusing even to request other available die repairmen to volunteer as substitutes for petitioner's Sunday assignments—with no reason given other than the insubstantial assertion that such conduct would amount to a "waiver" of a right held by the respondent under the

labor contract[2]—respondent manifested its rigid unwillingness to accommodate to the slightest degree to the "religious needs" of petitioner.

4. On petition for rehearing, the majority of the court below held that the interpretive regulations of the Equal Employment Opportunity Commission requiring accommodation by an employer to the Sabbath observance of his employees "are not consistent with the [Civil Rights] Act" (Pet. 57a). This holding substantially undermines the federal protection against religious discrimination incorporated in Section 703 (a)(1) of the Civil Rights Act and conflicts squarely with the rationale of this Court's decisions in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *In re Jenison*, 375 U.S. 14 (1963), where conduct required by an individual's belief was held to be within the protection of the First Amendment's guarantee of the "free exercise" of religion.

Nor does the Equal Employment Opportunity Commission stand alone in its view that Sabbath-observing minorities are entitled to protection against discharge or refusal to hire where accommodation to their religious practices would not impose undue hardships upon employers. As the Appendix to this Memorandum demonstrates (pp. 1a-6a, *infra*), the same policy

[2] The fact that an employer or a labor union is given a "right" under a collective-bargaining agreement does not entitle it to exercise that "right" in a manner inconsistent with Title VII of the Civil Rights Act of 1964 and its protections for individual employees. Compare, for example, *Local 53* v. *Vogler*, 407 F.2d 1047, 1054 (5th Cir. 1969); *United States* v. *Sheet Metal Workers*, 416 F.2d 123 (8th Cir. 1969); *United States* v. *IBEW Local No. 38*, 428 F.2d 144 (6th Cir. 1970), and authorities there cited. A contract between the employer and a union cannot grant to either of them "rights" which conflict with federal law.

has been adopted as to public or private employers in the States of Illinois, New Jersey, New York and Pennsylvania and in the City of New York. The decision below jeopardizes future efforts to obtain similar protection in local jurisdictions and thereby seriously threatens the free exercise of religion by many thousands of devout adherents to religious faiths throughout the country.

5. In both this case and in *Stimpel* v. *State Personnel Board,* 85 Cal. Rptr. 797, 6 Cal. App. 3d 206 (1970), now pending on petition for certiorari, No. 701, this Term, lower courts have sustained the discharge of individual employees who were unavailable for work one day a week on account of their religious beliefs, without *any* specific demonstration of how this absence caused *any* harm, much less "undue hardship," to their *employers.* And in opposing the petition for certiorari in *Stimpel,* the State of California has cited with approval (see Brief in Opposition, No. 701, p. 10) the decision of an intermediate New York court which held that an individual could be refused employment as a baggage clerk because his religious beliefs required him to wear a beard. *Eastern Greyhound Lines* v. *New York Division of Human Rights,* 311 N.Y.S. 2d 465. That decision is now on appeal, but it demonstrates how the position taken by the courts below in this case and in *Stimpel* results in the substantial erosion of rights secured by the First Amendment and the Civil Rights Act. For there is surely no less basis in the First Amendment to protect the adult who wears a beard for religious reasons than the school-child who wears a black armband for political ones. And in *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969), this Court held that the wearing of black arm-

bands by children could be prevented by school officials only on a showing that such a rule "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509. (Even Justices Black and Harlan, dissenting from the result in *Tinker*, relied on the importance of maintaining school discipline and would apparently not have allowed the same restriction to be applied with respect to adults.)[3] Yet on far less of a showing of disruption or interference the respondents in this case and in *Stimpel*—as well as the bus line which is the employer in the New York case—have sought to prevent the free exercise of religion by their employees.

6. Dissenting in *Welsh* v. *United States*, 398 U.S. 333, 372 (1970), Mr. Justice White—speaking for the Chief Justice and Mr. Justice Stewart in addition to himself—observed that the Free Exercise Clause of the First Amendment "protects conduct as well as religious belief and speech." He noted that, "[a]lthough socially harmful acts may as a rule be banned despite the Free Exercise Clause even where religiously motivated, there is an area of conduct which cannot be forbidden to religious practitioners but that may be forbidden to others." The conduct involved here and in *Stimpel*—faithful observance of a weekly day of rest—comes squarely within that rule. In the present case, the Equal Employment Opportunity Commission has interpreted the applicable federal statute as in-

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[3] *Jackson* v. *Dodson*, 424 F.2d 213 (6th Cir. 1970), in which this Court denied certiorari on October 12, 1970, No. 355, this Term, is, of course, distinguishable because, as the Court of Appeals noted there, the record "does not disclose that the conduct of [the plaintiffs] and the length of their hair were designed as an expression within the concept of free speech." 424 F.2d at 217.

corporating the constitutional rule, thus making this an instance in which "free exercise values [have] prompt[ed] Congress to relieve religious believers" (398 U.S. at 373) of burdens which employers would seek to impose. The construction given to the statute by the court below frustrates this salutary objective, and it is most important that this Court clarify the law and governing principles before other members of religious minorities are subjected to similar discriminatory treatment.

7. A fundamental error committed by the majority below was its premise, stated in the initial decision and again in the opinion denying rehearing, that the rights of the parties were to be defined by "the obligations contained in the collective bargaining agreement" (Pet. 48a) which was said to be "equally and uniformly applied to all of the employees" (Pet. 57a). As a result of this error, the court below concluded that the contractual arbitration procedure for deciding disputes under the collective bargaining agreement was a total substitute for the remedy provided in the Civil Rights Act. That conclusion is erroneous for various reasons, the simplest of which is that petitioner's claim under the federal statute goes beyond the terms of the agreement and does not depend solely on whether the agreement was violated by his discharge.

The issue determined by the grievance arbitration was whether the union contract, which embodied the agreement between respondent and the union, prohibited the discharge of an employee who was unavailable for Sunday overtime work and who refused, for religious reasons, to obtain a substitute. If it did, petitioner was obviously entitled to relief under the contract. If it did not, petitioner was still entitled to pur-

sue his claim under the Civil Rights Act, since the protections given him by that Act cannot be denied him simply because respondent and the union agree in their contract that they may be denied. Hence the "award of [the] arbitrator" which the majority below believed should be "binding on both parties" (Pet. 62a) was not determinative of the issue now presented for judicial decision—even if, *arguendo*, it may be viewed as having bound all parties on the question whether the discharge violated the collective bargaining agreement.

As is demonstrated in the petition (pp. 9-10), the decision of the majority below on this aspect of the case conflicts squarely with decisions of the Fifth and Seventh Circuits, and the opinion below explicitly acknowledged a conflict (Pet. 61a). The issue is of major importance because, if the view of the majority below is not reversed, the rights granted by the Civil Rights Act will be abridged or defeated by agreements between employers and unions to insert similar provisions in their collective bargaining agreements.

CONCLUSION

This case and *Stimpel* v. *State Personnel Board*, No. 701, this Term, concern adherents to Christian sects who have lost their employment because of their observance of religious duties. The legal issues presented by these cases are also of major importance to thousands of Sabbath-observing Jews and faithful Moslems living in the United States—each of whom must observe one day in the week as a day of total rest. This Court recognized as long ago as *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940), that the Free Exercise Clause of the First Amendment encompasses a "freedom to act;" that freedom is safeguarded, as well, by the Civil

Rights Act of 1964. The decision below—as well as that in No. 701—effectively wipe out that cherished right. They do so not on the basis of any proof or demonstration in these records that the conduct involved—total observance of a weekly day of rest—is "socially harmful" or presents a "substantial threat to public safety, peace, or order," but simply on the assertion that the employer might "be harassed" if "many such claims" were filed (Pet. 58a) and on the erroneous premise that accommodation to religious requirements is neither constitutionally nor statutorily required (Pet. 59a). This Court should grant certiorari in both cases and, upon plenary consideration, clarify the legal obligations of public and private employers in the area of religious practices.

Respectfully submitted,

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APPENDIX

Illinois

The following guidelines on discrimination because of religious observance of the Sabbath and other religious holidays have been issued by the Illinois Fair Employment Practices Commission in accordance with Section 7 of the Illinois Fair Employment Practices Act (S. B. 609, L. 1961, as amended, Illinois Revised Statutes, Chapter 48, Section 857, Subsection 7). The guidelines are effective July 26, 1968.

> Several charges filed with the Commission have raised the question of whether it is discrimination because of religion for an employer to give job examinations at a time or day observed as the Sabbath by persons wishing to take the test, or to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath, or who observe certain special religious holidays during the year, and, as a consequence, do not work on such days.
>
> The Commission believes that the duty not to discriminate on religious grounds, required by Illinois Revised Statutes, Chapter 48, Section 853, Subsection 3(a) [Section 3, S. B. 609, as amended (Illinois ¶ 22,403)], includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer, or by the employee at some other time. The employee should possibly be able to rule out hardship even if another of similar qualifications cannot be found, if he himself agrees to do the necessary work either a day before or a day after the Sabbath, even by unpaid overtime, if necessary.

Examination and interviews for employment must be given at a time when they are available to all and not a time or place which will require a violation of one's religious observances and convictions.

Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

The Commission will review each case on an individual basis in an effort to seek an equitable application of these Guidelines to the variety of situations which arise due to the varied religious practices of the people of Illinois.

New Jersey

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
52 WEST STATE STREET, TRENTON, N. J. 08608
609-292-4605

January 10, 1968

Meyer Pesin, Esq.
Howard I. Rhine, Esq.
Co-Counsel
National Jewish Commission on
Law and Public Affairs
66 Court Street
Brooklyn, New York 11201

Dear Messrs. Pesin and Rhine:

You have inquired as to the view of the Division on Civil Rights regarding the applicability of the employment sections of the New Jersey Law Against Discrimination to discrimination against employees who observe Friday evenings, Saturdays or any other day of the week as the Sabbath and, as a consequence, cannot work on such days. In making this inquiry, you have drawn our attention to

the recently promulgated guidelines of the Federal Equal Employment Opportunity Commission, dealing with religious discrimination relating to observance of the Sabbath and other religious holidays. These guidelines state that the employment section of the 1964 Federal Civil Rights Act "... includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." As an example of "undue hardship to the employer," the guidelines mention the situation "... where the employees needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." Finally, the guidelines provide that "... the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable."

The New Jersey Law Against Discrimination provides that it shall be an unlawful employment practice for an employer to refuse to hire or employ or to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because of an employee's or prospective employee's religious creed (N.J.S.A. 18:25-12 (f)). Employers, however, may establish and maintain bona fide occupational qualifications for employment positions, and may choose among individuals on the basis of competence, performance, conduct or any other reasonable standard (N.J.S.A. 18:25-2.1).

We recognize that ideally an employer would like to be able to call upon any of his employees to work at any time. On the other hand, the employee's or prospective employee's right to be free of religious discrimination includes the right to follow the usual religious observances of his faith. The problem, therefore, is to strike an appropriate balance between the needs of the employer for efficiency in operations and harmony among his employees and the needs of the Sabbath Observer to be employed and earn a livelihood without discrimination.

After full consideration of this matter, we have concluded that the approach taken by the Equal Employment Opportunity Commission represents a fair accommodation of these competing needs. The employment sections of the Law Against Discrimination demonstrate the strong public policy of this State against discriminatory employment practices, and in our opinion this policy requires some accommodation by the employer to the religious needs of his employees. We have concluded, therefore, that under the New Jersey Law Against Discrimination, sabbath observance is not a valid basis for refusing to hire or promote, discharging or otherwise discriminating against an employee, unless the absence of the employee will result in an undue hardship to the employer. Furthermore, the strong public policy of this State against discrimination in employment indicates that the employer must carry the burden of showing that he is unable to operate his business in the absence of any particular employee.

We believe that our acceptance of the guidelines of the Equal Employment Opportunity Commission will result not only in a fair accommodation between the needs of the employer and employee but will also lead to a desirable uniformity of coverage between the Federal and State civil rights laws.

The determination of what constitutes "undue hardship upon the employer" must of course be determined on a case by case basis. Please feel free, therefore, as particular applications of these guidelines are presented, to inquire of us concerning our view of the Law Against Discrimination.

Sincerely yours,

GEORGE S. PFAUS
George S. Pfaus
Director

GSP:mt

New York State

". . . I deem the Guidelines . . . as good and workable device in attempting to determine whether or not discrimination is involved. It is my opinion that if a guideline can be used throughout the United States it should be a basic minimum for New York State." *Rubin* v. *Metropolitan Life Insurance Company,* Case No. C-12725-66 (May 28, 1968) (Commissioner Robert J. Mangum)

New York City

COMMISSION ON HUMAN RIGHTS
STATEMENT TO EMPLOYMENT AGENCIES AND EMPLOYERS

(June 2, 1970)

The New York City law against discrimination on religious grounds prohibits the discharge or refusal to hire a person because of his religious practices, including practices with respect to observation of the Sabbath.

Under the law, it is the employer's obligation to accommodate to the religious needs of Sabbath Observing Jews and members of other faiths, such as Seventh Day Adventists, with special requirements.

In September 1969 [*New York Law Journal,* 9/11/69, p. 1], the City Commission on Human Rights adopted as a standard for cases under city law the guidelines on religious discrimination of the Federal Equal Employment Opportunity Commission. The federal guidelines require employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship on the conduct of the employer's business." The City Commission places the burden of proving "undue hardship" on the employer.

The federal standard has been used in a number of cases brought before the City Commission since September 1969. The EEOC Guidelines in full are as follows:

[Equal Employment Opportunity Commission guidelines are quoted]

These guidelines correspond to the letter and spirit of the New York City law against discrimination on religious grounds. They should be used by all employment agencies operating in New York City in all referrals to employers. This is consistent with the agencies' and the employers' obligations under the law.

Pennsylvania

Regulation No. 112, Pennsylvania Human Relations Commission (October 17, 1967)

OBSERVANCE OF THE SABBATH AND OTHER RELIGIOUS HOLIDAYS

Section 5(A) of the Law prohibiting discrimination because of religious creed includes an obligation on the part of an employer to make reasonable accommodation to the religious needs of employees and applicants for employment, who regularly observe Friday evening or Saturday or some other day of the week as their Sabbath, or who observe certain religious holidays during the year, and as a consequence, do not work on such days.

An employer will be expected to make such reasonable accommodations to the religious needs of such employees where same can be made without undue hardship on the conduct of the employer's business. The Commission will review each case on an individual basis in an effort to seek an equitable application of the provisions of this regulation.